Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Baja Broadband Operating Company, LLC	)	CSR-7111-Z
(f/k/a Orange Broadband Operating Company,	)	
LLC and Carolina Broadband, LLC)	)	
	)	
Request for Waiver of Section 76.1204(a)(1) of	)	
the Commission's Rules	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 2010 **Released: March 4, 2010**

By the Chief, Media Bureau:

I. INTRODUCTION

1. On June 24, 2009, Baja Broadband Operating Company, LLC ("Baja" or "Petitioner") filed an amended request for waiver of the ban on deploying integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules.[1] For the reasons stated below, including extreme financial hardship and a willingness to purchase integrated devices from refurbishing companies that will sell integrated set-top boxes to subscribers at retail, we grant Baja's request.

II. BACKGROUND

A. Section 629 of the Act

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices more than ten years ago as part of the Telecommunications Act of 1996.[2] The Commission implemented this directive in 1998 through the adoption of the "integration ban," which established a date after which cable operators no longer may place into service new navigation devices (*e.g.*, set-top boxes) that perform both conditional access and other functions in a

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[1] 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the basic navigation device required by this rule is referred to as the "integration ban."

[2] 47 U.S.C. § 549(a) (requiring the FCC "to adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor"); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996).

single integrated device.[3] Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.[4] On two occasions, the National Cable and Telecommunications Association ("NCTA"), on behalf of all cable operators, sought – and obtained – extensions of that deadline.[5] The Commission ultimately fixed July 1, 2007 as the deadline in order to afford cable operators additional time to determine the feasibility of developing a downloadable security function that would permit compliance with the Commission's rules and to allow cable operators and consumers to avoid the additional costs otherwise associated with the separation of hardware.[6]

3. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.[7] This "common reliance" is necessary to achieve the broader goal of Section 629 – *i.e.*, to allow consumers the option of purchasing navigation devices from sources other than their MVPD.[8] Although the cable industry has challenged the lawfulness of the integration ban on three separate occasions, in each of those cases the D.C. Circuit denied those petitions.[9] In limited circumstances, however, operators may be eligible for waiver of the integration ban.[10]

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[3] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14803, ¶ 69 (1998) ("*First Report and Order*") (adopting Section 76.1204 of the Commission's rules, subsection (a)(1) of which (1) required multichannel video programming distributors ("MVPDs") to make available by July 1, 2000 a security element separate from the basic navigation device (*i.e.*, the CableCARD), and, in its original form, (2) prohibited MVPDs covered by this subsection from "plac[ing] in service new navigation devices … that perform both conditional access and other functions in a single integrated device" after January 1, 2005); *see also* 47 C.F.R. § 76.1204(a)(1) (1998).

[4] *First Report and Order,* 13 FCC Rcd at 14803, ¶ 69.

[5] In April 2003, the Commission extended the effective date of the integration ban until July 1, 2006. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) ("*Extension Order*"). Then, in 2005, the Commission further extended that date until July 1, 2007. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6810, ¶ 31 ("*2005 Deferral Order*").

[6] *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

[7] *See Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 220, 226, ¶ 19 (2007) (citing the *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30) (explaining why the Commission "require[d] MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions").

[8] *See* S. REP. 104-230, at 181 (1996) (Conf. Rep.). *See also Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004). As the Bureau noted, Congress characterized the transition to competition in navigation devices as an important goal, stating that "[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality."

[9] *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008); *Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000). The Commission argued, and the D.C. Circuit agreed, that the integration ban was a reasonable means to meet Section 629's directive. *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) ("this court is bound to defer to the FCC's predictive judgment that, '[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.'").

[10] For example, Section 629(c) provides that the Commission shall grant a waiver of its regulations implementing Section 629(a) upon an appropriate showing that such waiver is necessary to assist the development or introduction of new or improved services. 47 U.S.C § 549(c). Furthermore, petitioners who have shown good cause have received waivers of the integration ban pursuant to Sections 1.3 and 76.7 of the Commission's rules. *See Great Plains Cable Television, Inc. et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 13414, 13426-7, ¶¶ 39-40 (2007) ("*2007 Financial Hardship Order*").

B. The Waiver Request

4. Baja filed its "First Amended Request for Waiver" of the integration ban based on demonstrated financial hardship.[11] Baja serves 67,000 subscribers largely in rural communities in New Mexico, Utah, Nevada, Colorado, and the Texas panhandle, and its primary competitors are DBS providers.[12] Baja seeks a waiver similar to those granted in orders waiving the integration ban for companies in dire financial straits.[13] In the fall of 2008, Baja was forced to dramatically reduce its capital expenditures as a result of the general downturn in the economy and the tightening of the credit markets.[14] As a result, Baja was unable to afford compliant high definition and digital video recorder ("HD/DVR") set-top boxes and essentially had to stop marketing its HD and DVR services.[15] Consequently, its ability to provide competitive services suffered.[16] Therefore, Baja also seeks a waiver that would allow it to place in service refurbished HD and DVR navigation devices with integrated security.[17]

5. Baja states that the costs related to compliance with the integration ban have prevented it from being able to offer HD and DVR devices and digital services in most of its markets since the fall of 2008.[18] Baja asserts that refurbished devices are available for "half or less than the cost of new CableCARD devices,"[19] and specifically cites another operator's estimate that new, compliant set-top boxes could cost $500 while similar, refurbished, non-compliant boxes may cost less than $200.[20] Baja explains that if it were granted waiver for the refurbished devices, the cost savings would allow it to "resume active offering of HD and DVR services in all of its markets."[21] Baja has committed to "pass these savings on to its customers."[22]

6. Baja states that it has had to reduce its marketing of digital services and to delay upgrading its five analog-only systems to digital in order to avoid the demand for compliant devices that it cannot afford to buy.[23] Baja also states that it has thirteen systems passing over 22,000 homes where it cannot provide video-on-demand, high-speed broadband or phone service in any of its systems because of capital

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[11] *See* Baja Broadband's First Amended Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (filed June 24, 2009) ("Waiver Request"). Baja previously filed for waiver of the integration ban in 2006. That request was denied, but the Bureau invited Baja to file an amended waiver request. *Armstrong Utilities, Inc., et al Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 11725, 11745, ¶ 57 (2007) ("*Armstrong Order*").

[12] Waiver Request at 1.

[13] *Id*. at 2 (citing *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 8557, 8564-5, ¶ 18 (2007); *Great Plains Cable Television, Inc. et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 13414 (2007)).

[14] Waiver Request at 3.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1.

[18] *Id*. at 3, 5-6; Letter from Paul Hudson, Counsel, Baja Broadband, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (Nov. 2, 2009).

[19] Waiver Request at 5.

[20] *Id*.

[21] *Id*. at 5.

[22] *Id*. at 6.

[23] *Id.* at 4.

constraints.[24] It also notes that many of these systems lack access to a competitive wireline-based provider.[25]

7. Baja further argues that a waiver in this instance would not conflict with Bureau precedent because Baja had already deployed more than 7000 compliant devices, and therefore could not "defeat the Commission's integration ban" because Baja is already commonly relying on separated security in those devices.[26] Baja further asserts that it supports CableCARDs employed in 44 retail devices, and states that the fact that there are so few retail devices reflects the rural nature of its systems and lack of access to big-box retail distributors.[27] Finally, Baja asserts that such a waiver is necessary to afford regulatory parity between Baja and its satellite-based competitors, DIRECTV and Dish Network. Because DIRECTV and Dish Network are allowed to offer integrated devices, Baja argues that the cost savings associated with such devices, coupled with Baja's inability to offer HD and DVR services, undermines Baja's ability to compete effectively.[28]

C. Comments

8. Adams Cable Equipment ("ACE"), a set-top box refurbishing company, explains in its comments that all of the devices it receives have been previously deployed to end users, that many of the devices it refurbishes are only 1-3 years old and generally have required only cleaning, replacement of batteries, restoration or replacement of the exterior, and/or replacement of the lens or resonator, and that these devices have many years of useful life ahead of them.[29] ACE contends that it is able to sell its refurbished set-top boxes at a lower cost than cable operators are able to refurbish their own devices because the volume of set-tops ACE deals with and its expertise in refurbishing these boxes provides economies of scale that a small cable operator cannot match.[30] ACE asserts that these savings would allow small cable operators to pass the savings on to their customers and allow them to use their capital to deliver the more advanced HD and DVR set-top boxes to small and rural markets.[31] ACE suggests that this waiver should not be limited to operators facing financial hardship, but should be extended to all cable operators because such a waiver would stimulate the economy and be environmentally sound.[32]

9. The Consumer Electronics Association ("CEA") also filed comments in response to Baja's request. CEA asserts that Baja raises an argument that the Bureau, Commission and D.C. Circuit have rejected since before the integration ban went into effect; namely, that waiver of the integration ban is necessary to make capital available for other uses.[33] CEA argues that if Baja is granted a waiver based on its financial hardship, it should be subject to the same conditions that other financially strapped cable operators were required to meet and should not be granted waiver for DVR devices, which are widely

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[24] *Id.*

[25] *Id.*

[26] *Id.* at 5-6 (quoting *Bresnan Communications, LLC, et al.*, *Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd 11725, 11745, ¶ 56 (2007)).

[27] *Id.* at 7.

[28] *Id*. at 11-12.

[29] *Id.* at 2.

[30] *Id.*

[31] *Id.*

[32] *Id*. at 2-3.

[33] CEA Comments at 2-3.

available at retail.[34] CEA also challenges Baja's cost estimates for CableCARD-compliant HD/DVR devices, and asserts that TiVo HD/DVRs retail for less than $300.[35] Therefore, CEA argues, granting Baja's waiver request would have a detrimental effect on the competitive market for navigation devices.[36] CEA also asks the Bureau to reject Baja's claim that a market for refurbished devices would create an "economic stimulus."[37] CEA asserts that while waiver might provide an economic stimulus for cable operators, it would ruin the economic stimulus caused by a competitive navigation device market.[38] Finally, CEA requests that the Commission reject Baja's request that the Commission rewrite its rules by waiver.[39]

10. Baja responds to CEA's comments by noting that it has committed to continue supporting common reliance.[40] Baja also challenges CEA's assertion that TiVo devices are available for less than $300; Baja claims that the service fees for a TiVo device bring its actual cost to at least $698, as compared to $200 for a refurbished integrated HD/DVR.[41] Baja reasserts that, due to its extraordinary financial hardship, the cost of compliance with the integration ban prevents Baja from offering its subscribers HD/DVR devices for lease.[42] Baja stated that it "would prefer if customers had the ability to also purchase low-cost set-top boxes from third parties," and has approached set-top box refurbishing companies about the prospects of selling refurbished set-top boxes directly to Baja's subscribers.[43] At least one company indicated that it would be willing to sell devices directly to consumers if Baja's waiver request were granted.[44]

III. DISCUSSION

11. Baja filed its request pursuant to Sections 1.3 and 76.7 of the Commission's rules. The Bureau has granted waiver of the integration ban pursuant to those rule sections in cases of non-speculative, extraordinary financial hardship.[45] In light of Baja's demonstrated financial hardship, and consistent with Bureau precedent, we conclude that a limited grant of Baja's request for waiver of the integration ban for non-HD, non-DVR set-top boxes is justified under Sections 1.3 and 76.7 of the Commission's rules. Furthermore, we believe that Baja's apparent commitment to purchase refurbished HD and DVR devices from set-top box refurbishing companies that commit to sell integrated set-top boxes at retail will serve the public interest. We conclude that the grant of a waiver to Baja under Sections 1.3 and 76.7 of our rules is justified in order to enable Baja to resume offering competitive HD

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[34] *Id.* at 3.

[35] *Id*. at 4-5.

[36] *Id*. at 5.

[37] *Id*. at 6-7.

[38] *Id*. at 7.

[39] *Id*. at 7-8.

[40] Baja Reply at 1-2; *see also* Waiver Request at 7.

[41] Baja Reply at 4-5.

[42] *Id*. at 6-7.

[43] Letter from Paul B. Hudson, Counsel, Baja Broadband, to Marlene H. Dortch, Secretary, Federal Communications Commission (February 18, 2010).

[44] *Id*.

[45] *See, e.g., 2007 Financial Hardship Order*, 22 FCC Rcd at 13426-7, ¶¶ 39-40.

and DVR service and to provide Baja's subscribers with another retail alternative to leasing a set-top box from Baja.

12. To demonstrate its extraordinary financial hardship, Baja submitted financial statements that demonstrate increasing operating losses and negative free cash flow over the past two years.[46] Baja also suffered net losses over that same period.[47] Baja lost money on its investments over the past two years, and Baja is continuing to borrow and increase its debt load.[48] Its short term debt exceeds its current liquid assets, and therefore Baja is unable to cover its short term debt.[49] In the *2007 Financial Hardship Order* and subsequent cases, petitioners made similar specific and unambiguous showings of extraordinary financial hardship. The Bureau found that those showings presented good cause for limited waiver of the integration ban for non-HD, non-DVR two-way set-top boxes.[50] Accordingly, Baja has met the standard for waiver of the integration ban for non-HD, non-DVR two-way set-top boxes under Sections 1.3 and 76.7 of the Commission's rules for a period of one year from the release date of this order.[51]

13. Baja has demonstrated that its extreme financial hardship makes it nearly impossible for the company to make the financial outlays necessary to purchase HD/DVR devices for its subscribers. Baja soundly refuted CEA's assertion that TiVo devices are available at a price point that is competitive with refurbished devices, and therefore such a solution could not provide relief for Baja.[52] Furthermore, Baja apparently has committed to purchase its refurbished HD/DVR devices from companies that would also sell such devices directly to consumers. We conclude that a conditional waiver of the integration ban would be in the public interest because such a waiver would enable Baja to resume offering competitive HD and DVR services to its customers for the first time since the fall of 2008, and would provide Baja's subscribers with another retail option for navigation devices. Accordingly, we grant Baja's request for waiver conditioned on (1) Baja publicly committing to purchase refurbished devices only from companies that also commit to sell the same devices directly to Baja's subscribers by filing an affidavit with the Commission within 15 days of the release of this order; and (2) Baja notifying all of its subscribers within 30 days of the retail availability of refurbished devices that they may purchase them directly from Baja's supplier, and providing contact information for that company. Such notification must expressly alert subscribers that the devices offered for sale may not work if they change providers, that the devices may not be nationally portable, and that the retail transaction will be with a third party and therefore Baja does not warrant the devices. The notice must also inform subscribers about whether the devices will work

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[46] Waiver Request at Exhibit 1.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *2007 Financial Hardship Order*, 22 FCC Rcd 13426-7, ¶¶ 39-40; *James Cable, LLC et al Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 23 FCC Rcd 10592, 10594-6, ¶¶ 4-9 (2008). As Baja explains, its financial hardship is extraordinary even when viewed in comparison to other cable operators who have received financial hardship waivers in the past. Waiver Request at 2 ("By contrast, at the time the Bureau granted them waivers based upon 'dire financial straits,' Charter's negative free cash flow was 'only' approximately 15% of its gross revenues, and James Cable's negative free cash flow appeared to be substantially lower than Baja's both in terms of gross dollars and as a percentage of revenue.").

[51] If, after one year, Baja believes that a further extension is warranted, Baja may file updated financial and other information for review (including the number of subscriber-purchased devices it has activated during this period) and request an extension. Upon such a filing, we will review the Baja's financial status and situation at that time to determine whether further waiver is warranted.

[52] Baja Reply at 6-7.

across Baja's entire footprint, and must include any other information Baja deems necessary to prevent consumer confusion.

14. Baja has requested that the refurbished device waiver have no expiration date because, it argues, the availability of refurbished, integrated set-top boxes will diminish over time and, in the future, more of the refurbished boxes will be compliant devices.[53] We agree with Baja's prediction that more of the refurbished boxes will be compliant devices as time progresses. Accordingly, we conclude that a term limit is unnecessary with respect to the waiver for refurbished HD/DVR set-top boxes.

IV. CONCLUSION

15. We conclude that grant of a conditional waiver of the integration ban to Baja is justified under Sections 1.3 and 76.7 of the Commission's rules. As explained above, we conclude that Baja has demonstrated good cause for waiver based on its financial hardship as well as its commitment to purchase devices from companies that will also offer those devices for sale directly to Baja's subscribers. Accordingly, we grant the Waiver Request, conditioned as outlined above.

V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3 & 76.7, waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED** to Baja Broadband Operating Company, LLC with respect to new non-HD, non-DVR set-top boxes for a period of one year.

17. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3 & 76.7, waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1)**IS GRANTED** to Baja Broadband Operating Company, LLC, with respect to HD and DVR boxes purchased from third-party vendors of refurbished boxes as conditioned in this order.

18. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

[53] Waiver Request at 10.